FILE COPY

JAN 11 193
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 423.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

REPLY BRIEF FOR PETITIONERS.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

INDEX.

	Page
I. U. S. Code, Title 46, Section 596, Applies to the "Dola Lawson"	1
II. The Instant Seamen are Entitled to Waiting Time and Damages, as Against Claims of Respondents, Out of Fund Realized from Sale of Vessel	6
III. Conclusion	10

AUTHORITIES CITED.

	Page
The Acropolis (D. C. N. Y.), 8 F. (2nd) 110	8
The C. S. Holmes (CCA 9), 237 F. 785	9
Gerber v. *Spencer* (1922) (CCA 9), 278 F. 886	7
Gilfillan v. *McKee* (1895), 159 U. S. 302	9
Inter-Island Steam Navigation Co. v. *Byrne* (1915), 239 U. S. 459	4
The Moshula (D. C. Cal.), 276 Fed. 35	7
O'Hara v. *Luckenbach S. S. Co.* (1926), 269 U. S. 364	3
Palace Shipping Co. v. *Caine*, A. C. 386 (House of Lords—1907)	8
The President Arthur (D. C. N. Y.), 25 F. (2nd) 1002	7
Roe v. *Kansas* (1929), 278 U. S. 191	9
The Rolph (CCA 9), 299 F. 52, cert. den. (1924), 266 U. S. 614	9
Rule 30, sub-div. 2 and 4—U. S. Sup. Ct. and CCA Rules	9
Sandberg v. *McDonald* (1918), 248 U. S. 185, 202	5
Sheppard v. *Taylor* (1828), 5 Peters 710	8
Slaker v. *O'Connor* (1929), 278 U. S. 188	9
Wilder v. *Inter-Island Steam Nav. Co.* (1908), 211 U. S. 239	5

STATUTES.

	Page
Dingley Act of December 21, 1898 (30 Stat. 756)	2
Seamen's Act of June 15, 1872 (Amending Act of July 20, 1790)	4
Seamen's Act of March 4, 1915 (Amending parent Seamen's Acts and adding new sections)	3
U. S. C., Title 46, §103 (R. S. 4214)	3
U. S. C., Title 46, §263 (R. S. 4321)	2
U. S. C., Title 46, §569 (Amending R. S. 4516)	3
U. S. C., Title 46, §596 (R. S. 4529)	2
U. S. C., Title 46, §601 (Repealing R. S. 4536)	4
U. S. C., Title 46, §673 (Seamen's Act of March 4, 1915, §2)	4

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 423.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

REPLY BRIEF FOR LIBELLANTS-PETITIONERS.

I. U. S. CODE, TITLE 46, SECTION 596, APPLIES TO THE "DOLA LAWSON".

The several repair and supply lienors, who but recently filed their appearance in this Court and have just submitted their brief (January 6, 1930), now, for the first time, seek to justify their conduct, whereby:

> "the amounts found to be due appellants were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from

> the order allowing same" (opinion of Court of Appeals: R., 74).

by making the untenable and futile contention (respondents' brief, p. 5) that:

> "Section 596, Title 46, United States Code, under which penalties are claimed in this case, does not apply to fishing or whaling vessels or yachts, and therefore does not apply to the fishing vessel 'Dola Lawson'."

This assertion is predicated on Section 26 of the Act of December 21, 1898, Chapter 28, 30 Stat. L. 756 (which is quoted thereunder in respondents' brief). They admit (respondents' brief, p. 6) that:

> "We have found no judicial determination of the point."

but base their contention on their interpretation of the note appearing in Supplement 3 to the U. S. Code Annotated, p. 449, under Title 46, Section 596, as follows:

> "The Commissioner of Navigation, commenting on this section, says: 'The statement this section shall not apply to fishing or whaling vessels or yachts, but shall apply to all vessels engaged in the taking of oysters, should appear in Section 596'."

The fallacy of respondents' argument is demonstrated when we ascertain just how fishing vessels, whaling vessels and yachts are classified in the Navigation Laws.

According to the same administrative view (now cited by respondents), there can be no question but that only vessels engaged in the whale, mackerel and cod fisheries are recognized as fishing vessels under the Federal Statutes, U. S. Code, Title 46, Section 263. Yachting

vessels are likewise specifically covered by U. S. Code, Title 46, Section 103.

The "DOLA LAWSON", as shown by the uncontradicted evidence (R., 36, 38-39), was engaged in and licensed for the coasting trade. Therefore she could not possibly come within the exceptions enumerated in the Act of December 21, 1898, even if that Act had not been repealed by subsequent all-embracing legislation, notably the Seamen's Act of March 4, 1915, and acts amendatory thereof.

It is significant, in this connection, that the editors of U. S. Code Annotated in their comment appearing at the end of U. S. Code, Title 46, Section 596, on p. 53, merely make the following suggestion:

> " 'Except as provided in Section 598 of this title, this section shall not apply to fishing or whaling vessels or yachts' or some equivalent provision should probably be added to this section'."

Indeed, it will be noted that even the comment of the Commissioner of Navigation relied on by respondents only goes so far as to suggest that his above-quoted language:

> "should appear in Section 596."

It is submitted that the Act of March 4, 1915—being a comprehensive act containing twenty sections—was passed:

> "to safeguard the seamen's welfare as workman" (*O'Hara* v. *Luckenbach*, 269 U. S. 364, 367)

contains in itself all the exemptions that Congress intended to incorporate therein. In the very first section of the Act, (U. S. Code 46, Section 569), we find a proviso that:

> "This section shall not apply to fishing or whaling vessels or yachts,"

though there is no such exception in the Act of June 7, 1872, C. 322, #14 (17 Stat. 265), which is re-enacted as Section 1 of the Act of March 4, 1915, without any reference to the Act of December 21, 1898. A similar exemption is made in Section 2 (U. S. Code, Title 46, Section 673), also without reference to the Act of December 21, 1898.

Section 12 (U. S. Code, Title 46, Section 601), on the other hand, specifically includes:

> "fishermen employed on fishing vessels as well as seamen,"

whereas Revised Statutes, Section 4536, which it repealed, contained no such proviso. It is thus evident that Congress had in mind just the particular exemptions it desired, and incorporated them only in the respective sections wherein it especially wanted to make provision therefor.

In *Inter-Island Steam Navigation Co.* v. *Byrne* (1915), 239 U. S. 459, 462, this Court had before it a quite similar point. Speaking through Mr. Justice McReynolds, the Court said:

> "* * * the suggested narrow construction would tend to defeat the particular end in view—the relief of vessels making relatively short voyages, with frequent opportunities for reaching ports, from burdensome requirements not *then* deemed essential to the welfare of seamen employed thereon. * * *.
>
> "The particular point now presented was reserved in *Wilder* v. *Inter-Island Steam Navigation Co.*, 211 U. S. 239. It has become of *less* importance since the Act of March 4, 1915, Chapter 153, 38 Stat.

at L. 1164, 1169, wherein the provisions of #61 of the *Act of 1872* were *re-enacted.*" (Italics added.)

Note: U. S. Code 46, Section 596, *re-enacts* #35 of the Act of 1872, *supra.*

To accept the "fish-boat" defense put forth at this late date by the respondents now before the Court, would, in the language of Mr. Justice McKenna's dissenting opinion in *Sandberg* v. *McDonald*, 248 U. S. 185, 202:

> "take us from the deck to the sea,—if we may use a metaphor suggested by our subject."

In *Wilder* v. *Inter-Island Steam Navigation Co.*, 211 U. S. 239, 246-7, 248, Mr. Justice Day, in delivering the opinion of this Court, used the following language, which is peculiarly applicable to the situations presented by the instant case:

> "* * *. But we are of opinion that this statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to effecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made them, as Mr. Justice Story declared, 'the wards of the admiralty'. *Harden* v. *Gordon*, 2 Mason 541, Fed. Cas. No. 6,047.
>
> We think, too, that the section is to be construed in the light of and in connection with the other provisions of the title of which it is a part. * * *.
>
> It seems to be clearly inferable from these provisions that wages which have thus been carefully conserved to the seamen were not intended to be subject to seizure by attachment, either before or after judgment.
>
> * * *. These provisions would be defeated if the seaman's wages, to be recovered at the end of the voyage, could be at once seized by an execution

> or attachment after judgment in an action at law. The evident purpose of the Federal statutes, that the seaman shall have his remedy in admiralty, would be defeated, and the seaman, in many cases, be turned ashore with nothing in his pocket, because of judgments seizing his wages, rendered, it may be, upon improvident contracts, from which it was the design and very purpose of the admiralty law to afford him protection."

Having carefully refrained from touching on a single one of the array of authorities relied on in petitioners' brief, it is evident that respondents are unwilling to give this Court the benefit of their:

> "authorities to the effect that a penalty statute such as Section 596 must be strictly construed." (Respondents' brief, p. 6.)

II. THE INSTANT SEAMEN ARE ENTITLED TO "WAITING TIME" AND DAMAGES, AS AGAINST CLAIMS OF RESPONDENTS, OUT OF FUND REALIZED FROM SALE OF VESSEL.

A sufficient answer to respondents' final contention that the present seamen are not entitled to the statutory wages provided by U. S. Code, Title 46, Section 596, as against claims of other maritime lienors, is found in the attitude displayed by these lienors from start to finish. Instead of seeing to it that the seamen were paid their wages as soon as the vessel was sold, we find that these amounts were withheld, at the instance of said lienors, in the teeth of the liberal doctrines of the admiralty in respect to the immediate payment of seamen's wages, as well as the letter and spirit of the remedial legislation passed to further ameliorate the condition of these "wards of the admiralty". See U. S. Code, Title 46, Section 601, hereinabove referred to.

Surely this Court will not sanction a method of procedure whereby, in the language that it adopted in *Wilder* v. *Inter-Island Steam Navigation Co., supra*:

> "A new hardship is added to a vocation already subject to its full share of the ills of life."

The lienors' brief, at p. 6, states:

> "As to whether or not they are entitled under the circumstances to a personal decree against the master and owner of the vessel for such penalties, these respondents are not concerned."

Petitioners submit that by this statement said respondents have inadvertently demonstrated their entire disregard of petitioners' rights in this matter. When we find that respondents' three District Court decisions interpreting U. S. Code, Title 46, Section 596, as a penalty statute, are contrary to and in the teeth of the great weight of authority discussed on pp. 12-26 of petitioners' opening brief, it would seem that these respondents should have been vitally concerned in leaving no stone unturned in having the wages earned by petitioners paid over to them with a minimum of delay, or at least, in *not* adopting the obstructive tactics that they employed. Indeed, *The President Arthur*, 25 F. (2nd) 1002, cited in respondents' brief, p. 7, allowed the seamen a maritime lien of the one month's extra pay, provided by U. S. Code, Title 46, Section 594, on a parity with their earned wages, out of the fund realized from the sale of the vessel, where the owner was in the hands of a receiver.

The Moshula, 276 Fed. 35, a decision of the District Court at San Francisco, rendered on October 5, 1921, is overruled by the opinion of the Ninth Circuit Court of Appeals in *Gerber* v. *Spencer*, 278 Fed. 889, handed down

on February 13, 1922, in which a rehearing was denied March 2, 1922.

In *The Acropolis,* 8 F. (2nd) 110, the owner was in the hands of a receiver in bankruptcy, and, like the owner of *The President Arthur*:

> "was unable to use any of the funds for the purpose of paying such wages."

Even if U. S. Code, Title 46, Section 596, had never existed, petitioners would, in view of the facts disclosed by the present record, still be entitled to "waiting time", under the doctrines repeatedly emphasized by this Court and the British House of Lords.

In *Palace Shipping Co.* v. *Caine,* A. C. 368 (1907), with regard to this phase of the matter, the House of Lords said:

> "* * * . And though statutory provision has been made for the protection of seamen, the ancient power of the Admiralty Court to shelter them from wrong is not superseded."

In *Sheppard* v. *Taylor,* 5 Peters 710, Mr. Justice Story, speaking for this court, held:

> "* * * . If the ship had been specifically restored, there is no doubt that the seamen might have proceeded against it in the admiralty, in a suit *in rem,* for the *whole* compensation due to them. They have by the Maritime Law an *undisputable* lien to this extent. This *lien* is *so sacred* and *indelible* that it has, on more than one occasion been expressly said, that it adheres to the last plank of the ship. 1 Peters Admiralty Reports, note 186, 195; 2 Dodson's Rep. 13; *The Neptune,* 1st Hagg. Admiralty Reports 227-239."

Compare *Slaker* v. *O'Connor*, 278 U. S. 188.
Roe v. *Kansas*, 278 U. S. 191.

In *Slaker* v. *O'Connor*, this Court said:

> "Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them."

In *Roe* v. *Kansas*, this Court held:

> "The alleged ground for the present writ is without substance and the circumstances justify the imposition of a penalty upon the party at fault."

Compare: Rule 30, sub-div. 2 & 4,—Supreme Court of the United States and the ten Circuit Courts of Appeal.

In the instant case the Court of Appeals likewise found (R. 74) that the distribution of the wages admitted to be due petitioners was withheld, (R., 63-64), at the instance of the respondents, "without any authority of law"—obviously on the ground that the right of these seamen to the immediate payment thereof "existed under any and all circumstances".

Compare: *Gilfillan* v. *McKee*, 159 U. S. 302.
The C. S. Holmes (C. C. A. 9), 237 Fed. 785.
The Rolph (C. C. A. 9), 299 Fed. 52, 55-56.

Nevertheless, as pointed out in their application for certiorari, p. 2, and brief in support thereof, pp. 9, 12, 13, petitioners were refused any part of the statutory wages that had accrued to each of them, which surely began to run, under the circumstances of this case, from the respective dates that their several claims were filed (R., 3-6; 17-19), or else, at the very least, im-

mediately after the findings made by the trial court on June 8, 1928, June 12, 1928, and September 4, 1928, respectively. Instead of such statutory wages, only interest was added to the wages improperly withheld, which interest was swallowed up by the one-half appellate costs assessed against petitioners, (R., 74-76), their share of these costs amounting to more than two and one-half times the interest then accrued. Neither of the courts below passed on the right of petitioners, Collie and Cook:

> "to damages for the breach of their respective contracts of hire, including, in the case of Ruffin Collie, return transportation and subsistence to Washington, North Carolina, the port of his shipment?" (Assignment of Error No. 4, R., 66.)

III. CONCLUSION.

The decree below should be modified, with directions that all the petitioners be allowed "waiting time" until the judgment of this Court is fully satisfied.

Primarily, this Court should provide for the exhaustion of the $1,600.00 balance in the District Court's registry to the payment of petitioners' earned wages, in addition to the extra pay and indemnities due each of said seamen, and the transportation and subsistence money due petitioner Collie, plus *full* costs of *all* the Courts,—"in preference to all other claims"; with a judgment over against the defaulting owner, Thomas D. Fergusson, for any deficiency, as well as *all* claims of the other respondents, he being liable *in personam,* under the pleadings and proofs.

Respectfully submitted,

J. L. Morewitz,
Proctor for Petitioners.

Percy Carmel,
Of Counsel.